In the Supreme Court of the United States.

OCTOBER TERM, 1915.

SPOKANE & INLAND EMPIRE RAILROAD Company, Plaintiff in Error, *v.* THE UNITED STATES. } No. 136.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT OF CASE.

This is a civil proceeding by the United States against the Spokane & Inland Empire Railroad Company to recover $1,500 for fifteen alleged violations of the safety-appliance act, approved March 2, 1893 (27 Stat. 531), as amended April 1, 1896 (29 Stat. 85), and March 2, 1903 (32 Stat. 943).

The first twelve counts charge that grab irons, and the last three counts that automatic couplers, were not provided on cars moving in interstate commerce as required by the act.

The case was brought in the United States District Court for the Eastern District of Washington.

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The trial resulted in verdict and judgment in favor of the Government on all counts, verdict having been directed on the last three counts. The case was taken by writ of error to the Circuit Court of Appeals for the Ninth Circuit, which unanimously affirmed the judgment of the District Court. (210 Fed. 243.)

STATEMENT OF FACTS.

Plaintiff in error operates several interurban electric lines. "One line extends from Spokane to Coeur d'Alene, and then to Hayden Lake, Idaho. Another line from Spokane to Moscow, Idaho, and a third one from Spring Valley to Colfax, both in Washington." (R. 19.) The particular line under consideration extends from Spokane, Washington, to Coeur d'Alene, Idaho, and is about forty miles in length, all of which is over the company's private right of way, except a mile and a quarter located upon the streets of Spokane. (R. 21.) The track is of standard gauge and weight of rail. (R. 20.) The trains "are made up according to standard railroad rules with markers to designate the trains, and are run on schedules and by train orders." (R. 20.) "The passenger station is reached by all interurban trains by leaving the freight yards [in which presumably the trains are made up] where they intersect Market Street, using Market Street to Main Avenue, Main Avenue to Lincoln, and Lincoln into the depot." (R. 19.) "On the interurban lines, tickets are sold for particular stations, the same as a railroad." (R.

20.) "The employees who are engaged in the street-car service do not have anything to do with the operation of the interurban service." (R. 20–21.) Some of the trains handle baggage and express, while freight moves over the line in freight cars. (R. 17.) "The cars handling freight are not brought down to the passenger station over the city streets. They stop at the freight terminals, and the cars handling freight are not run over the street railway line." (R. 18.) The cars ordinarily operated on this line have power brakes, and it is necessary for employees to go between cars in order to couple up the air hose and connect wires for electric heating and lighting. (R. 21.)

Three of the cars, in the particular movement in question, were not equipped with automatic couplers, and the other twelve did not have grab irons, unless an opening in the sill or buffer of the car, described below, could be considered as such.

ARGUMENT.

The case presents two questions:

I. Do the provisions of the safety appliance acts apply to interurban cars, which move for a small portion of the route over the tracks of a street railway?

II. Is the testimony of expert witnesses admissible to the effect that openings in the buffer of the car are better and safer than the grab iron or handhold known in railroad circles?

I.

The provisions of the safety appliance acts are applicable to interurban electric cars.

The act as amended provides:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the provisions and requirements of the Act entitled "An Act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes," approved March second, eighteen hundred and ninety-three, and amended April first, eighteen hundred and ninety-six, shall be held to apply to common carriers by railroads in the Territories and the District of Columbia and shall apply in all cases, whether or not the couplers brought together are of the same kind, make, or type; and the provisions and requirements hereof and of said Acts relating to train brakes, automatic couplers, grab irons, and the height of drawbars shall be held to apply to all trains, *locomotives,* tenders, cars, and *similar vehicles* used on any railroad engaged in interstate commerce, and in the Territories and the District of Columbia, and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith, excepting those trains, cars, and locomotives exempted by the provisions of section six of said Act of March second, eighteen hundred and ninety-three, as amended

> by the Act of April first, eighteen hundred and ninety-six, *or which are used upon street railways.* (32 Stat. 943.) [Italics ours.]

The act is remedial and should be liberally construed. Its primary object is to promote the public welfare by securing the safety of employees and travelers. (*Johnson* v. *Southern Pacific*, 196 U. S. 1; *United States* v. *Central of Georgia Ry. Co.*, 157 Fed. 893, 894; *United States* v. *C., B. & Q. R. R. Co.*, 237 U. S. 410, 413; *United States* v. *Erie Railroad Co.*, 237 U. S. 402.)

It is just as necessary to the accomplishment of this purpose that the cars described be equipped as required by the act as that those drawn by steam should be so equipped. Nor is it material that a negligible part, in this case about one thirty-fourth, of the movement was over tracks used by street cars.

The provision in question is by the very terms of the act made applicable to "all trains, locomotives, tenders, cars, and *similar vehicles used on any railroad* engaged in interstate commerce," etc. This court stated in the case of *Omaha Street Railway* v. *Interstate Commerce Commission* (230 U. S. 324, 335) that "if the scope of the act is such as to show that both classes of companies were within the legislative contemplation, then the word 'Railroad' will include Street Railroad."

The facts of this case bring it within both the letter of the statute and the scope of its purpose.

Plaintiff in error concedes that "an interurban electric road which carries passengers, freight, mail,

and express across a State line is a railroad within the purview of the act" (Brief, p. 32), and states that "there is no question in the case at bar of whether a particular type of railroad is within or without the act. The act does not purport to except any type of railroad from its operation; merely cars of a certain class, used in a certain manner." (Brief, p. 26.) It is also conceded that, since the company uses this interstate line for its freight cars, not handled upon the city streets (Brief, p. 27), "there is, of course, no claim that such cars are not subject to the act." (Brief, p. 28.) In this connection see *Southern Ry. Co.* v. *United States*, 222 U. S. 20, and *Spokane & Inland Empire R. R. Co.* v. *Campbell* (C. C. A., 9th Circuit), 217 Fed. 518.

This phase of the case, therefore, may be limited to a consideration of whether or not the particular trains and cars in question fall within the exception which exempts from the operation of the act "trains, cars, and locomotives * * * which are used upon street railways."

The exception relied upon is in the nature of a proviso and should be construed strictly, and not extended to cover exceptions not clearly within its terms.

> We are led to the general rule of law, which has always prevailed, and become consecrated almost as a maxim in the interpretation of statutes, that where the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is

> construed strictly, and takes no case out of the enacting clause which does not fall fairly within its terms. In short, a proviso carves special exceptions only out of the enacting clause; and those who set up any such exception must establish it as being within the words as well as within the reasons thereof. (*United States* v. *Dickson*, 15 Pet. 141, 165.)

In *Arnold* v. *United States* (147 U. S. 494, 499) the court quoted from *Brown* v. *Maryland* (12 Wheat. 419) as follows:

> Chief Justice Marshall recognized as "a rule of interpretation to which all assent that the exception of a particular thing from general words proves that, in the opinion of the lawgiver, the thing excepted would be within the general clause had the exception not been made."

Plaintiff's claim reduces itself to the proposition that an interstate carrier may exempt itself from compliance with the provisions of the safety-appliance acts by merely operating its trains over a small portion of the tracks used by street cars. The Circuit Court of Appeals aptly characterized this claim as follows:

> To hold with the plaintiff in error on this point would be to hold that, because the company uses the tracks of its street car lines for a mere trifle of the distance between its terminal points in order to reach the center of the city of Spokane, its entire interurban line, which has all of the characteristics in build and operation of a standard steam road, is not

> subject to the Safety Appliance Act. That would indeed be a case of "the tail wagging the dog." (210 Fed. 243, 246.)

An analogous claim was made in a case arising under the hours of service act. In rejecting the claim, this court said:

> A trifling interruption would not be considered, and it is possible that even three hours by night and three hours by day would not exclude the office from all operation of the law, and to that extent defeat what we believe was its intent. (*United States* v. *Atchison, T. & S. F. Ry. Co.*, 220 U. S. 37, 44.)

The Government insists that here also the insignificant incident of the use of street car tracks for a trifling portion of the entire route would not exempt the interurban trains from the operation of the law during the entire movement.

II.

Testimony of expert witnesses to the effect that openings in the buffer of a car were better than the ordinary grab iron properly excluded.

The provisions of the act relating to grab irons is as follows:

> * * * it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab irons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars. (Sec. 4, Act of March 2, 1893, 27 Stat. 531.)

The trial court instructed the jury that:

> If you should find from the evidence in this case that although there might not have been on the ends of the cars referred to anything which would be known technically as grab-irons or hand-holds, yet if there were upon the ends of such cars an appliance which could be used as a grab-iron or hand-hold and which would afford as much security to men coupling or uncoupling the cars as would be afforded by having what would be technically known as grab-irons or hand-holds on the ends of the cars, then your verdict should be for the defendant. (R. 26.)

This instruction was certainly as favorable as the plaintiff in error could reasonably expect.

The openings in the sills or buffers of the cars which were claimed to satisfy the requirements of the act are described as follows:

> The openings in the end sills provide an absolute grab of the fingers * * *. The purpose of a hand-hold is to afford security to a man who is between the cars if for any reason they should start. It is necessary for men to go between the cars and stoop down to connect the air hose and the electric light and heating wires. The man who is down between the cars is within four or five inches of the ground with his hands. If the car starts, he has to reach up 37 or 38 inches from the ground to get to the top of the end sill, and has to place his hand 3½ inches over the top of the sill if he reaches the opening, and then turn it an inch or three-quarters before

> he can get enough to grab on. * * * I don't believe I could get much more than the ends of my fingers up there myself. (Testimony of superintendent of interurban system, R. 21.)

Though the evidence thus minutely described these openings in the buffers of the cars, the jury were permitted to view them, and, in this connection, were instructed as follows:

> It is for you to say from that testimony and from your personal examination of the cars whether the appliance provided by this company complies with the Act of Congress. (R. 26.)

Upon this issue, plaintiff in error offered to prove by experienced railroad men who had examined the cars, that—

> the hand-holds or grab-irons in the buffers or sills of such cars were sufficient to protect men who might be required to go between the cars in coupling or otherwise handling them, that they were sufficient to accomplish purposes intended to be accomplished by the provisions of the safety appliance act requiring hand-holds or grab-irons to be placed upon the end of cars used in interstate commerce, and that they were better than those commonly used upon cars engaged in interstate commerce. (R. 29.)

This evidence was excluded upon the ground that the jurors were fully as competent to pass upon the question in issue as experts, and that

to admit such testimony would be to invade the province of the jury.

It is hard to conceive how experts could have afforded any assistance to the jury in determining whether a buffer of a car, which they had seen, with a slot 3½ inches from its edge, was as safe or safer to grab in an emergency than a regular grab iron. This was the very issue the jury were to determine, and calls for nothing more than the exercise of ordinary common sense. There was no question of science involved, but simply one depending upon common knowledge and observation, and requiring no special training or experience to decide. The evidence was therefore properly excluded.

> Where the subject of a proposed inquiry before a court is not a matter of science, but of common observation, upon which the ordinary mind is capable of forming a judgment, experts ought not to be permitted to state their conclusions. (*Milwaukee & St. Paul Ry. Co.* v. *Kellogg*, 94 U. S. 469, syllabus.)
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> Whether a witness is shown to be qualified to testify to any matter of opinion is always a preliminary question for the judge presiding at the trial, and his decision thereon is conclusive unless clearly erroneous as matter of law. *Spring Co.* v. *Edgar*, 99 U. S. 645; *Stillwell & Bierce Co.* v. *Phelps*, 130 U. S. 520; *Montana Railway* v. *Warren*, 137 U. S. 348. But in this case, independently of any such consideration, the question whether the place where the plaintiff stood on the wharf was reasonably safe was one of the questions to be

> determined by the jury, depending on common knowledge and observation, and requiring no special training or experience to decide, and upon which therefore no opinions of witnesses were admissible. *Milwaukee & St. Paul Railway* v. *Kellogg*, 94 U. S. 469; *White* v. *Ballou*, 8 Allen, 408; *Simmons* v. *New Bedford Steamboat Co.* 97 Mass. 361; (*Inland & Seaboard Coasting Company* v. *Tolson*, 139 U. S. 551, 559.)

This evidence might likewise have been excluded upon the ground that the law specifies handholds or grab irons, devices well known in the railroad world, and did not authorize any substitute.

> Technical words or phrases in a statute will be understood in a technical sense when the act treats of the subject in relation to which such words are technically employed. (Sutherland, Statutory Construction, 2d ed., sec. 395, and cases cited.)

The following description, as given in the Car Builders' Dictionary (1909), p. 130, discloses how inadequate are the slotlike openings in the buffer as a compliance with the provision requiring grab irons or handholds on cars:

> All handholds should be made of iron not less than $\frac{5}{8}$ inch in diameter; handholds on the sides and ends of cars should be 24 inches long in the clear, except end-sill handholds, which should be from 18 to 24 inches long.

In a recent case construing this statute the court said:

> The precautions taken by a carrier might afford as complete, or indeed fuller, protection to its employees than the means demanded by the law. It none the less follows that imposition of the penalty must be visited upon the carrier guilty of a noncompliance with the act of Congress. (*United States* v. *Philadelphia & Reading Ry. Co.*, 223 Fed. 215, 217; see also *Virginian Ry. Co.* v. *United States*, id. 748, C. C. A., 4th Circuit.)

CONCLUSION.

The judgment of the Circuit Court of Appeals should be affirmed.

Respectfully,

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DECEMBER, 1915.

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